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[2024] PBRA 117

Application for Reconsideration by Hall

Application

1. This is an application by Hall (the Applicant) for reconsideration of a decision of a panel of the Parole Board not to direct his release or recommend open conditions dated the 20 May 2024 following an oral hearing on 13 May 2024.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the application for reconsideration; the decision and the dossier.

Request for Reconsideration

4. The application for reconsideration is dated 21 May 2024.

5. The grounds for seeking a reconsideration are that the hearing was procedurally unfair and the decision was irrational. The application for reconsideration does not distinguish between the two grounds but it seems that it is said the decision was procedurally unfair in that (i) the panel relied on a psychological report which was prepared for the last parole hearing and the author of the report was not called to give evidence so that her opinion could not be challenged and (ii) there was no psychologist on the panel who could have made an independent assessment of the competing opinions. Further it is said that the decision was irrational in that out of date evidence was relied on as against the up to date assessments and the decision was against the weight of the evidence.

Background

6. The Applicant committed serious offences against young females between 1995 and 2009. For offences of rape and sexual assault against two young females he was, on 9 October 2009, sentenced to imprisonment for public protection with a minimum period to serve of 6 years less time spent on remand. Those offences were committed between 2005 and 2009. On 28 August 2012 he was sentenced to a determinate sentence of 14 years for offences of rape and sexual assault on a different young female.

Current parole review

7. The Applicant's first parole application made in 2021 was refused. A second application was refused on the papers in 2022. An application for an oral hearing was refused but that decision was overturned by the High Court who directed that an oral hearing should take place.

8. The hearing on 13 May was before a panel of two neither of whom was a psychologist. Evidence was given by the Prison Offender Manager (POM); the Community Offender Manager (COM); a consultant clinical psychologist who had treated the Applicant and a prisoner commissioned psychologist.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 20 May 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

10. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

11. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

12. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28.

Irrationality

13. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in Associated Provincial Houses ltd -v- Wednesbury Corporation 1948 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

14. In R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words at para 116 "*the*

issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

15. In R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was *"to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied)".* This test was adopted by a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

16. As was made clear by Saini J this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in DSD was binding on Saini J.

17. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

18. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

19. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed, or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

20. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

    (a) express procedures laid down by law were not followed in the making of the relevant decision;
    (b) they were not given a fair hearing;
    (c) they were not properly informed of the case against them;
    (d) they were prevented from putting their case properly;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

21. The overriding objective is to ensure that the Applicant's case was dealt with justly.

22. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

23. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: *"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."*

The reply on behalf of the Secretary of State (Respondent)

24. The Respondent has made no submissions in response to this application.

Discussion

25. **Procedural unfairness: (i) Relying on the evidence of a psychologist who was not called to give evidence.** Any panel considering whether to release a prisoner on parole will take into account any previous decision of the Board and the evidence on which it is based, all of which will be contained in the dossier. Not only should a panel look to see why parole was refused in the past but also what steps, if any, were recommended by the panel to try and facilitate release. One of the matters which a panel will properly consider is what progress the prisoner has made since the last application. The previous panel decided that there was further consolidation work to be done despite the progress made by the Applicant through the trauma therapy carried out with the consultant clinical psychologist. Their decision was based in part on the evidence and report of Ms R (forensic psychologist) who carried out a risk assessment in 2021. Ms R had concluded that it was necessary for the Applicant to carry out consolidation work at a PIPE unit.

26. It was inevitable and correct that Ms R's report and opinion would be considered at this parole hearing to see whether a period at a PIPE was necessary before the Applicant could be released. In one of the bullet points in para 4.5 of the decision letter the panel says: *"[Ms R, POM] and the COM at the time of the last oral hearing in 2021 were all very clear that [the Applicant] needed be transferred to a PIPE unit*

in order to aid future risk management. However since then [the Applicant] has refused to engage with a PIPE unit and although further 1-1 work has been recommended in place of a PIPE unit this work is yet to commence raising concerns that core risk management is still outstanding".

27. These were proper and appropriate concerns for the panel to have following up on the last decision and progress which had been made. The panel were not adopting the view of Ms R that attendance at a PIPE had to happen before the Applicant could be released but they were investigating whether further consolidation work was necessary.

28. Other witnesses were asked to comment on Ms R's report and her opinion that attendance at a PIPE was necessary and did so. The panel expressly accepted that Ms R's risk assessment was out of date but as it seemed to provide some of the evidence on which the previous refusal was based, it was perfectly proper to take it as a starting point and ask the witnesses to consider it. That does not mean that the panel ignored what they had read in Mr L's (forensic psychologist in training) report it was just that it formed less of a starting point for the investigation. Mr L's report was in line substantially with the prisoner commissioned psychologist which was given and considered in the hearing.

29. **(ii) Not having a psychologist on the panel.** There is no requirement to have a psychologist on a panel where psychologists are giving evidence and it is not always logistically possible. There is no reason to suppose that the panel did not properly understand the evidence. Indeed it is clear from the decision that they did.

30. The fact that the Applicant's advocate was asked to lead the evidence from the psychologists may be unusual but doesn't indicate that the panel weren't capable of doing so. Most advocates would be grateful for the opportunity to adduce the evidence of the psychologists first.

31. In my judgment there is no proper basis for the suggestion that this hearing was procedurally unfair. All the evidence appears to have been considered with great care and the review and analysis of the evidence given in the decision is more than adequate. There is no need in parole hearings to only rely on evidence given orally by witnesses even where it is not agreed. The contents of the dossier will always form part of the evidence which it is for the panel to consider in the light of the up to date evidence.

32. **Irrationality:** It needs to be understood that the test for irrationality is a high one as it needs to be. The panel heard the evidence not only of the professionals but also the Applicant and it was for them to decide in the light of their impressions of the witnesses whether the Applicant was safe to release.

33. While the evidence of all but one of the professionals at the hearing was in favour of progression, two of them recommended a transfer to open conditions for a period before release. Only one witness, the consultant clinical psychologist, was of the opinion that it was safe to release the Applicant straight away. The COM did not recommend release or progression to open; the POM recommended a move to open, as did the independent psychologist.

34. In the light of the overall nature of the evidence it is impossible to sensibly argue that it was irrational of the panel not to direct release where three of the professionals gave reasoned opinions as to why the test for release was not met. As is set out a para 12 above it is only the decision not to release which can be subject to an application for reconsideration. A decision not to recommend open conditions cannot be challenged by a reconsideration application.

35. The panel's concerns about the USB stick which are complained of were justified. As the panel said *"[The Applicant] clearly puts himself into a risky situation. The panel concluded that [the applicant] has yet to develop further into risky behaviour and that this work needed to be carried out in closed conditions".* The panel were entitled to take that view on the evidence.

36. There are other matters which are raised in the application which I will not deal with separately. I have considered all the matters raised both individually and cumulatively and in my view they do not support the conclusion that the decision was irrational in that no reasonable tribunal could have reached the conclusion that this panel did. I also do consider that they have given adequate reasons for their decision.

Decision

37. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

John Saunders
12 June 2024